CURRENT LEGISLATION

THE NEW ARTICLES OF WAR.—The former Articles of War (1916) 39 Stat. 619, 650, U. S. Comp. Stat. (1916) § 2308a, comprising the body of military law [1] applicable to the United States Army, have undergone an extensive revision. [2] Dissatisfaction with, and criticism of the manner in which military justice was administered during the war in the armed forces at home and abroad was the circumstance causing the revision to be made. The principal faults of the former Articles were declared to be that they permitted excessive sentences, [3] that there was no provision for any real appeal from a judgment of a court-martial, and that, in this connection, under them the appointing authority of a general court-martial could order a reconsideration of the evidence by the court in the case of an acquittal. [4]

The discussion developed two distinct points of view of the theory upon which the Articles were to be revised. The one is the more orthodox view,—that as courts-martial are an adjunct of the Army to enforce discipline, [5] they should be entirely under the control of Army officers, and that their punishments should be meted out mainly for the purpose of securing "an efficient fighting unit by making it a disciplined one." [6] The other view, as represented by the Chamberlain Bill, [7] and advocated by former Brig.-Gen. S. T. Ansell and others, [7a] is that some civilian body should be appointed to pass on all court-martial records, and that courts-martial should be guided to a greater degree by the rules and procedure governing criminal trials in civil life. [8] The Chamberlain Bill also proposed that enlisted men should sit on every general or special court-martial when an enlisted man was to be tried, [9] and it set definite limits to the sentences which could be imposed for violation of the Punitive Articles. [10]

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[1] The Army Regulations issued by the President through the Chief of Staff are also sometimes spoken of as constituting part of our military law, as are the "customs of the service." *Manual for Courts-Martial,* 1917, xiii.

[2] The following Articles of the Code of 1916 were amended: 2, 4, 5, 6-8, 11-19, 21, 23, 24, 28 and 29 consolidated into new Art. 28, 30-32, 36, 38, 40-43, 45-50, 52 and 53 consolidated into new Art. 52, 56, 57, 68-70, 75, 76, 81, 93, 94, 104, 112, 116, 119. The following are new additions: 29, 50½, 53.

[3] The punishment to be administered in time of war was left to the discretion of a court-martial for violation of Articles 54-69, 71-81, 83-94, 96. Art. 82: death penalty mandatory in time of war; Art. 86: death penalty excepted in time of peace; Art. 95: dismissal. Art. 41 prohibited flogging, branding, marking or tattooing. Par. 345 *Manual for Courts-Martial,* 1917, declares certain other punishments are now prohibited by the customs of the Service. Maximum peace-time limits to punishments were ordered by the President by authority of Art. 45. See *Manual for Courts-Martial,* 1917, par. 349.

[4] This power was derived from the construction given Art. 47. There was no new trial. The appointing authority ordered the court to reconvene and reconsider the written record of the evidence.

[5] Gen. Kernan, *Hearings before a Subcommittee of the Committee on Military Affairs of the United States Senate on S. 64 for the Establishment of Military Justice* (1919) 66th Cong., 1st Sess., p. 445.

[6] *Report of Special War Dept. Board on Courts-Martial and their Procedure* (1919) p. 12. This Board was composed of Maj.-Gen. Kernan, U. S. A., Maj.-Gen. O'Ryan, N. G. N. Y., and Lieut.-Col. Ogden, J. A., U. S. A.

[7] S. 64, 66th Cong., 1st Sess. 1919.

[7a] Gen. Ansell, *Hearings, supra,* footnote 5, p. 56. This view was embodied in Art. 52 of the Chamberlain Bill.

[8] Gen. Ansell, *Hearings,* p. 56.

[9] Chamberlain Bill, Arts. 5 and 6.

[10] Chamberlain Bill, Arts. 53-98.

None of these radical changes have been adopted, and the present Articles of War, (1920) 41 Stat. 812, drafted by the officers of the Judge-Advocate General's Dept. at the request of the Senate Committee, represent more nearly the views of the Kernan-O'Ryan-Ogden Board,[11] appointed by the General Staff to collect the opinions and views of Army officers of more extended court-martial experience.

It might be well to note that the Artiles of War had already been extensively revised and amended in 1916, with a view to their co-ordination, reclassification, and to do away with any then existing anachronisms.[12] Further, between 1912 and 1916 several acts of Congress had been passed containing provisions looking toward the reform of the system of military justice. These exempted peace-time deserters from loss of citizenship rights, created special courts-martial, and provided for the reforms involved in changing over the former United States Military Prison to a Disciplinary Barracks, where soldiers convicted of strictly military offenses are now confined, instead of in penitentiaries.[13] However, the defects in the Articles already noted became apparent during the stress and strain of the War and there was virtual unanimity that changes should be made.[14]

These defects seem to have been eliminated in the present Articles, which show throughout that their general aim is to protect better the rights of the accused, without removing from the commanding officers the power to enforce discipline through the instrumentality of the court martial, which remains subject to military control throughout.

The first important change is made in Art. 8 which provides that on eevry general court-martial there shall be appointed a "law" member,[15] an officer of the Judge-Advocate General's Dept., or for lack of an officer of that department some other officer especially qualified to act as a "law" member. His duties, as provided by Art. 30, are to rule in open court upon all questions of law arising during the trial except upon challenges, findings, and upon the sentence. His recommendations are to be the rulings of the court on these points, and also upon all questions as to the admissibility of evidence.[16] This idea is sound, and is sure to reduce enormously the errors of law made at trials; but it is open to the practical objection that the authorized officers of the Judge-Advocate General's Dept. number only 115 of all grades, making it doubtful whether enough can be detailed for this work to give this Article its desired effect.[17]

Another beneficial change is made in Art. 11, which now requires the

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[11] The substance of the changes proposed by this Board to Arts. 4, 11, 12, 18, 24, 31, 32, 40, 41, 69, 75 and 81 were adopted. They also proposed an Art. 50½, which gave to the Judge-Advocate General alone the powers which he now shares with the Board of Review constituted by the Art. 50½ which was adopted. See *infra* for a discussion thereof.

[12] The 1916 Code, 39 Stat. 619, 650, amended over 76 Articles of the Code of 1874, and 10 Articles of that Code were dropped. For changes occasioned by former wars see *Manual for Courts-Martial,* 1917, ix, x.

[13] Gen. Crowder, *Hearings,* p. 1294. See (1912) 37 Stat. 356; (1913) 37 Stat. 721; (1915) 38 Stat. 1084.

[14] Sen. Chamberlain, *Hearings,* pp. 356, 358.

[15] The idea of a "law" member is derived mainly from the British. Compare the office and duties of their "judge-advocate", who is not a member of the court-martial, and who acts in an "advisory" capacity only. *Hearings,* pp. 180-181, 386, 390, 391.

[16] *Manual for Courts-Martial,* 1921, Par. 89a. He also has other minor duties. *Ibid.* Par. 89a(2), and will ordinarily be of the rank of major or higher. *Ibid.* Par. 12c.

[17] Army Reorganization Act, 1920, c. I, sec. 8. The number of other officers available to act as competent "law" members is of course entirely uncertain and variable.

appointment of a counsel for the defense as an officer of every general or special court-martial, and thus ensures the accused of being properly defended. The accused may still select his own counsel also. (Art. 17.) This change converts the "trial" judge-advocate into a strictly prosecuting officer. Formerly, in theory, he represented both sides, where the accused had no counsel.[18] One peremptory challenge is permitted each side, (Art. 18,) and courts-martial must announce a judgment of acquittal. (Art. 29.) As judgments of acquittal can no longer be ordered reconsidered, (Art. 40,) this change from the former practice seems especially desirable.

Voting by members of a court-martial is now to be by secret ballot, except on objections to rulings of the "law" member, (Art. 31,) and a unanimous decision "of all the members present when a vote is taken" is required to impose a sentence of death. Three-fourths of the members must concur upon a sentence of life imprisonment, or a sentence of more than ten years. A two-thirds vote is required for other convictions and sentences. (Art. 43.)[18a] The fact that evidence which according to civilian rules would be inadmissible was sometimes admitted during trials by court-martial, has led to the revision of Art. 38, requiring that the President's regulations of the procedure shall "insofar as he shall deem practicable" apply the rules of evidence recognized in United States District Courts in criminal cases.[19]

Another notable change is in double jeopardy provisions of Art. 40, which has been amplified extensively. No proceeding in which the accused has been found guilty is to be considered a trial until the confirming authority has taken final action. *No* authority may order the reconsideration of an acquittal, or a finding of not guilty upon any charge or specification; nor may a sentence be ordered reconsidered with a view to increasing its severity, unless it is below the "minimum."[20] This expressly forbids one of the most objectionable practises under the old Articles, which aroused a great deal of criticism.[21] Furthermore compulsory self-incrimination is now specifically prohibited in any proceedings before an investigating officer, (Art. 24.) This change should do away with any attempts at holding a "third degree" before such officers. An innovation is made in Art. 13 which permits the trial of an officer by a special court-martial. This change makes more effectual the new provisions of Art. 12. This Article permits an officer who has general court-martial jurisdiction to direct in his discretion that the accused be tried by a special court-martial. The power of a special court-martial to inflict sentences of not more than six months, is, however, retained.[22]

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[18] *Manual for Courts-Martial,* 1917 par. 96.

[18a] This is substantially Art. 46 of the Chamberlain Bill adopted over the protest of the Kernan-O'Ryan-Ogden Board. See *Report, supra,* footnote 6, p. 29.

[19] As a result of this provision the chapter on Evidence in the *Manual for Courts-Martial* has been revised and enlarged in the new 1921 edition by Professor Wigmore.

[20] This section of Art. 40 embodies the substance of the famous W. D. G. O., no. 88, July 14, 1919.

[21] There were 1,082 acquittals by general courts-martial approved, and 149 acquittals disapproved and ordered reconsidered in the A. E. F. from its organization down to June 30th, 1919. Report to Gen. Pershing made by Gen. Bethel, Judge-Advocate Gen. of the A. E. F., *Hearings,* p. 561.

[22] We are still technically at war. W. D. G. O. of Jan. 22, 1919, states that general courts-martial "could very properly observe peace-time limits." Thus a recruit deserts, which is a possible capital offense in time of war, (Art. 58,) and so formerly had to be tried by a general court-martial. The commanding general investigates the charges and determines (subject to Art. 70) that five or six months would be ample punishment. He may now, under Art. 13, send the case to a special court-martial for trial.

Formerly the President was authorized by Art. 45 to issue a general order fixing definitely maximum limits to the sentences which courts-martial could impose. But this general order was operative *in time of peace* only. A change of great importance has been made in this Article by the mere omission of the four words, "in time of peace." General Crowder in testifying before the Subcommittee on Military Affairs of the United States Senate,[23] remarked,

"I venture the assertion that if we had entered the War with that phrase 'in time of peace' eliminated, you gentlemen would never have heard anything, nor would the country have heard anything, about excessive sentences."

The maximum punishment order will now operate in time of war as well as in time of peace, though most probably in war-time an order permitting the imposition of heavier penalties will be issued in place of the present order.[24]

But perhaps the most important change of all is embodied in the new Article 50½. Under this Article a Board of Review is constituted in the Judge-Advocate General's Office, consisting of officers of his department, whose duty is to examine and report upon all sentences which formerly required confirmation by the President before execution. Not even the President himself can order the execution of any sentence of dishonorable discharge or any penitentiary sentence until the record of the trial is approved as legally sufficient by this Board. Before ordering any affirmative action in regard to a record, however, the Judge-Advocate General must concur with the finding of this Board. In case they do not concur, the record with their respective written opinions is sent to the President for action. This Board has the power to find a record legally insufficient, or that the rights of the accused have been substantially impaired, and thereupon to order that the sentence be set aside and a rehearing be granted, which is in effect a new trial.[25] Thus we see that another outstanding defect of the former Articles has been removed by the creation of this board of officers, with its power to remove completely the stigma of an illegal conviction. Heretofore the Judge-Advocate General could merely make recommendations to the appointing authority that the proceedings in question be set aside because of illegality, and the President could only exercise clemency. The stigma of a conviction could be removed only by the appointing authority or by a special Act of Congress.[26] The inclusion of this board in the scheme of administering military justice seems to be a compromise between the proposal of the Chamberlain Bill for a civilian court, and the recommendation of the Kernan-O'Ryan-Ogden Board which made provision for no such tribunal at all.

Article 70, dealing with the method of preferring charges, has been extensively amended. "Any person subject to military law" may now prefer charges, and must do so under oath. The manner in which charges are to be acted upon has been complicated in a seemingly unnecessary manner, entailing the addi-

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[23] *Hearings,* p. 1166.

[24] The present maximum punishment order was issued Dec. 10th, 1920, to be effective February 4th, 1921. *Manual for Courts-Martial,* 1921, p. 277. In many instances the punishments are lighter than formerly. Compare *Manual for Courts-Martial,* 1917, p. 161.

[25] At this rehearing the personnel of the court-martial must not be the same, the accused cannot be retried upon any charge or specification upon which he was found not guilty, and the new sentence, in case of a reconviction, must not be more severe.

[26] Rev. Stat. § 1199, U. S. Comp. Stat. (1916) § 1777, originally Act of July 28, 1866, 14 Stat. 334. The question as to the powers of the Judge-Advocate General under this statute was in dispute between Gen. Crowder and Gen. Ansell. Gen. Crowder's contention, that the clause "revise and review" gave the Judge-Advocate General advisory powers only was upheld by Secretary Baker. For briefs on both sides see *Hearings,* pp. 57-91, 94.

tion of nearly twenty pages of instructions in this regard to the new Manual for Courts-Martial,[27] and increasing the burden of army "paper-work."

Few changes of importance have been made in the Punitive Articles. Where an officer embezzles company funds or money entrusted to him by soldiers, he is now triable for these crimes after dismissal or other separation from the service if the crimes are not discovered, or if he is not apprehended, until after such severance has taken place. (Art. 94). The constitutionality of this section, or of the similar one first introduced in the Code of 1916, Art. 94,[28] has yet to be tested. It is suggested that his discharge or dismissal (without confinement) would put a complete end to his military status[28a] and leave him amenable only to civilian courts and trial by jury under Amendment VI to the Constitution. The crime of desertion has been extended to include leaving one's place of duty or organization with intent to avoid a hazardous duty or to shirk important service. (Art. 28.) This would apply especially to absences just before an engagement. Formerly the offender could only be tried as absent without leave under Art. 61, or for misbehaviour before the enemy, (Art. 75,) or under "General Article" 96. If a conviction resulted in such case, and the death penalty was imposed,[29] confirmation by the President was necessary; whereas for desertion confirmation by the Board of Review (Art. 50½) of the commanding General of the Army in the Field, is sufficient. (Art. 48.) The attempt to relieve the enemy is now made punishable under Art. 81, and Art. 76 is clearly made to apply to "any person subject to military law" who compels his commanding officer to surrender.

These are the principal important changes made by the recent revision. On the whole they were necessary, and they are substantial, beneficial and apparently sound and sensible. It is to be hoped that they will be found as satisfactory in practice as they appear on paper.[30]

THE MASSACHUSETTS SMALL CLAIMS PROCEDURE.—The Massachusetts Act authorizing small claims procedure, discussed in a recent number of this REVIEW,[1] left it to the justices of the district courts to make uniform rules with reference to such procedure. These rules have just been published, with the annotations of the Committee of the Justices.[2] In the main they follow out admirably the purpose of simplicity and speed which the Act aimed to achieve, adopting the mechanical devices of administration generally in use in small claims courts. There are, however, a few provisions which are worthy of special attention, because they may change somewhat the operation of the statute.

The principle of awarding discretionary costs has been extended by the rules not only to the case where a plaintiff brings his action by writ, where the action would be cognizable in a small cleams court,[3] (Rule 15.) but also to all cases where either party has set up a "frivolous or vexatious claim or defense". (Rule 9.) This may well be further extended to cover the *mala fide* request of

[27] *Manual for Courts-Martial,* 1921, pp. 55-74.

[28] Applying only to the embezzlement of Government funds. (1916) 39 Stat. 665, U. S. Comp. Stat. (1916) § 2308a, Art. 94.

[28a] *Cf.* (1921) 21 COLUMBIA LAW REV. 330.

[29] "There have been no executions for [purely] military offenses during this war." Secretary Baker, *Hearings,* p.1356.

[30] The new Articles of War went into complete effect on Feb. 4th, 1921.

[1] (1920) 20 COLUMBIA LAW REV. 901. The act referred to is Mass., Acts 1920, c. 553.

[2] Amendments to rules of the district courts of Massachusetts. Promulgated January 3, 1921, effective January 31, 1921.

[3] This was authorized by the Act, *supra,* § 5.